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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945

No. 95

RAILROAD RETIREMENT BOARD ET AL., *appellants*

v.

DUQUESNE WAREHOUSE COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

No. 103

DUQUESNE WAREHOUSE COMPANY, *appellant*

v.

RAILROAD RETIREMENT BOARD ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AS AMICUS CURIAE

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1. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW.

In No. 95.—The opinion of the Circuit Court of Appeals, Second Circuit, (R. 302) is reported at 148 F. 2d 473. This opinion affirmed the judgment of the District Court for the Southern District of New York (R. 282) reported at 56 F. Supp. 87, which reversed the decision of the Railroad Retirement Board dated February 11, 1943 (R. 19-45).

In No. 103.—The opinion of the United States Court of Appeals for the District of Columbia (R. 81) is reported at 149 F. 2d 507. This opinion affirmed the final decision of the Railroad Retirement Board and reversed the judg-

ment of the District Court for the District of Columbia (R. 71-73) rendered March 21, 1944, not reported. The District Court reversed the decision of the Railroad Retirement Board dated June 15, 1943 (R. 36-44).

2. PERTINENT PROVISIONS OF STATUTES INVOLVED.

The pertinent provisions of the Railroad Retirement Act of 1937, U.S.C. Title 45, Sec. 228(a), are as follows:

PART I.

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes", be, and it is hereby, amended to read as follows:

DEFINITIONS.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage; or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however*, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-

railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

* * * * * * *

(m) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

As the statutory provisions quoted above are the same as Section 1(a)(b) of the Railroad Unemployment Insurance Act, U.S.C. Title 45, Sec. 351(a), it is not necessary to reproduce the Railroad Unemployment Insurance Act provisions herein. We shall refer to these two acts as the railroad employment acts.

The pertinent provisions of the Interstate Commerce Act, as amended, U.S.C. Title 49, Sec. 1(3)(a), read as follows:

Sec. 1. (3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all per-

sons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

3. STATEMENT OF THE GROUNDS AND REASONS OF THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, AMICUS CURIAE, FOR SUBMITTING THIS BRIEF.

The American Warehousemen's Association, as *amicus curiae,* shows herein that a decision by this Court sustaining the findings and conclusions of the Railroad Retirement Board in these two cases will, as a precedent, have a broad national effect. Such a decision will have a disturbing effect upon virtually all public warehouses in this country.

The American Warehousemen's Association, general office 222 West Adams Street, Chicago, Illinois, has more than 800 members who operate cold storage warehouses and non-refrigerated warehouses at many locations in each of the 48 states. These warehouse companies are engaged in public warehousing and the commercial storage of merchandise which is well described in the report of the Interstate Commerce Commission in *New York Warehousing*, 198 I. C. C. 134.

The warehouse companies are dependent upon the railroads for essential transportation service and in their dealings with the railroads the relationship is that of common carriers and shippers. The warehouses are the storage and shipping plants for the many customers of each warehouse. The shipping group is composed of the warehouse companies acting in conjunction with their customers, the consignors, consignees and rate payers of railroad transported shipments. Warehouse companies are shippers. *Warehouse Company* v. *United States*, 283 U. S. 501, 505-506.

The Board's findings, opinion and conclusions evidently mean that (1) all of the business activities of the Duquesne Company, including all of the going business of this private industry, are common carrier transportation services of the Pennsylvania Railroad Company; (2) the warehouses, offices and all real and personal property and equipment of the Duquesne Company are common carrier facilities and equipment utilized in the common carrier transportation services of that railroad company; and (3) all of the officers and employees of the Duquesne Company are in substance employed by the railroad company. There is no reference to facts or statutory provisions that adequately supports these sweeping conclusions. Section 1(a) of the railroad employment acts covers the extensive transportation services of a line haul railroad company and the

relatively small services incidental thereto such as the icing of refrigerator cars enroute and customary terminal services which such a line haul carrier may allot to an owned or controlled company or to a contractor. The Board's findings transcend this limited statutory authorization.

The effects of a final decision in these cases will extend beyond the interests of the Duquesne Company and its employees to the commercial warehouse industry throughout this country. This widespread effect will arise in several, including the following respects:

1. If the final decision is that commercial warehouse services performed by warehouse companies on their private premises are common carrier railroad transportation services when performed by an owned or controlled warehouse company such decision will be very disturbing in the following respects:

(a) If such services are declared to be railroad transportation services *per se*, will other warehouse companies, manufacturers, wholesalers and retailers, in which railroads have no pecuniary interest, who also perform such services, be transferred from coverage by the Social Security Act to employers under the railroad employment acts on the grounds that they perform services which have been found to be common carrier railroad transportation terminal services? Compare with *Union Stock Yard & T. Co.* v. *United States*, 308 U. S. 213, 220-221. The Board has not distinguished the storage and freight handling services of these non-railroad companies from the storage and freight handling services of an owned or controlled company.

(b) If such services are so declared to be railroad transportation services *per se* will the warehouse companies and these other shippers have any remaining protection from unjust discrimination by virtue of the provisions of Sec-

tions 2 and 3 of the Interstate Commerce Act, Part I? We raise this question because it is very doubtful that an owned or controlled warehouse company performing what are declared to be common carrier transportation services can be deemed to be a competitor of other warehouse companies, not owned or controlled by any railroad, who perform the same services as a component of their private business activities. The point is that the competition evidently will not be under similar circumstances and conditions.

2. A final decision that ordinary commercial storage performed by any warehouse company on non-railroad premises for the sole use, benefit and profit of traders, which is not a component of railroad transportation service, will have a disturbing effect upon virtually every cold storage warehouse company and non-refrigerated warehouse company in this country. Litigation will be aroused —not settled.

3. The findings by the Board, if approved by the courts, that commercial warehouse and storage services of an owned or controlled warehouse company are common carrier transportation services, in direct opposition to the rulings of the Interstate Commerce Commission will create conflicts with the administration of the Interstate Commerce Act that will be disturbing to the whole commercial warehouse industry of this country.

4. STATEMENT OF THE CASE.

The main issue herein is—is the Duquesne Company an employer within the meaning of Section 1(a) of the two railroad employment acts in that it is an owned and controlled company which operates equipment and facilities and performs certain services specified in that section. The services are—

"in connection with the transportation of passengers or property by railroad or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or handling of property transported by railroad."

In No. 95. The Railroad Retirement Board, in its findings of fact, conclusions and opinion found that the Duquesne Warehouse Company, the appellee herein, is an employer, as to all of its real and personal property, equipment and business activities, within the meaning of Section 1(a) of the Railroad Retirement Act. (R. 19-45). This has reference to retirement benefits sometimes called old age pensions.

These findings, if sustained, will transfer the Duquesne Company, and all of its officers and employees, from coverage by the Social Security Act to coverage by the Railroad Retirement Act.

In the United States District Court, for the Southern District of New York, the Duquesne Warehouse Company instituted the proceeding under Section 11 of the Railroad Retirement Act to set aside the decision of the Board. The Court entered judgment ordering the decision of the Board set aside and annulled. (R. 282). (56 F. Supp. 87).

The Circuit Court of Appeals, for the Second Circuit, in 148 F. 2d 473, affirmed the judgment of the District Court. (R. 302).

The case is before this Court on certiorari granted on June 11, 1945. (R. 329).

In No. 103. The Railroad Retirement Board, in its 14 findings of fact, conclusions and opinion found that the Duquesne Warehouse Company, the appellant herein, is an employer, as to all of its real and personal property, equipment and business activities, within the meaning of Section 1(a) of the Railroad Unemployment Insurance Act. (R. 36-44).

These findings, if sustained, will transfer the Duquesne Company, as to unemployment insurance, from coverage under the Social Security Act and state acts to coverage under the Railroad Unemployment Insurance Act.

In the United States District Court, for the District of Columbia, (opinion of March 21, 1944, not reported) the Duquesne Warehouse Company instituted the proceeding under Section 5 of the Railroad Unemployment Insurance Act to set aside the final decision of the Board. The court reversed the findings and action of the Board. (R. 71-73).

The United States Court of Appeals, for the District of Columbia in 149 F. 2d 507, reversed the judgment of the District Court and affirmed the final decision of the Board. (R. 81).

The case is before this Court on certiorari granted on June 11, 1945. (R. 88).

The Duquesne Warehouse Company, incorporated in Pennsylvania, is a private corporation which is authorized to engage, and it is engaged, in the public warehousing business, a well-known private business activity. It operates a warehouse at Pittsburgh, Pa., and another warehouse at East Liberty, Pa. Both warehouses are equipped with side tracks which are connected with the railroad lines of the Pennsylvania Railroad Company. The customers of the Duquesne Company in carrying on their private business activities ship substantial quantities of merchandise in carloads and less-than-carload lots outbound from the Duquesne Company's warehouses via the Pennsylvania Railroad and cause substantial quantities of merchandise to be transported via the Pennsylvania Railroad, in carloads and less-than-carload lots, inbound to the warehouses. The Duquesne Company, in cooperation with its many customers, participates in that shipping of freight to and from its warehouses by railroad and also by the means of common carrier and contract motor trucks. There

is no evidence showing that the Duquesne Company controls the routing, or exercised the right to route, this freight traffic.

The Pennsylvania Railroad Company owns the physical warehouses and the side tracks which it has leased to the Duquesne Company at a substantial annual rental. (No. 95, R. 66). The railroad company also owns the capital stock of the Duquesne Company. The company is separately operated and managed. Its operations are under the direction of a superintendent "who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company" (No. 95, R. 137). The record is wholly devoid of any evidence whatever as to exercise by the railroad company of control in the management of the warehouse company.

After reviewing the evidence, the American Warehousemen's Association, as *amicus curiae*, concluded that the Duquesne Company is engaged exclusively in private business activities; that it has not operated any facilities or equipment or performed any railroad transportation services within the meaning of Section 1(a) of the two railroad employment acts; that its business transactions with the railroad company as to real property were and are that of lessor and lessee and as to merchandise transported that of common carrier and shipper. Further that it, the Duquesne Company, has handled only the freight of its customers on its private premises and it has not handled any freight of the railroad company on railroad premises or elsewhere under any master and servant or principal and agent contract or arrangement of any kind.

Therefore our conclusions are that the Duquesne Company is not an employer within the meaning of the two railroad employment acts and that the Board's findings and action, as alleged by the Duquesne Company, are not in accordance with the facts; are unsupported by the evi-

dence of record; are contrary to the evidence of record and are arbitrary, capricious and contrary to law.

We submit that this Court should—

In No. 95. (a) Find that the Board's findings, conclusions and opinion are not supported by the evidence, and are arbitrary and invalid.

(b) Affirm the opinion of the Circuit Court of Appeals, Second Circuit.

In No. 103. (a) Find that the Board's findings, conclusions and opinion are not supported by the evidence, and are arbitrary and invalid.

(b) Reverse the opinion of the Court of Appeals of the District of Columbia.

(c) Affirm the judgment of the District Court for the District of Columbia.

5. SUMMARY OF ARGUMENT.

The Board's findings and conclusions in both cases, No. 95 and No. 103, are arbitrary and invalid in that they are without substantial support in the evidence; are contrary to the evidence; and reflect errors of law. In No. 95 the opinion of the Circuit Court of Appeals, Second Circuit, should be sustained, and in No. 103 the opinion of the Court of Appeals of the District of Columbia should be reversed in this Court, and the judgment of the lower court affirmed.

Legislative intention to confine the application of the two railroad employment acts strictly to common carrier transportation service is clearly expressed in the opening paragraph of Part I thereof; also in Sections 1(m) and 1(b) of these acts, and is repeatedly expressed in Section 1(a) thereof. Likewise in the history of this legislation. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

Such legislative intention is also evinced in the Social

Security Act, which covers all private industry and which became effective, as to salaries and wages earned, on January 1, 1937, the same date that the Carriers Taxing Act became effective on salaries and wages. *Helvering* v. *Davis*, 301 U. S. 619. There is no indication of legislative intention to give the Railroad Retirement Board any jurisdiction whatever over private industry or private business activities, thereby curtailing the scope of the Social Security Act.

The Duquesne Company is a private industry engaged exclusively in private business pursuits on its private premises. The Railroad Retirement Board has no statutory jurisdiction of an owned company insofar as it is engaged in private business activities. In such case the Social Security Act applies.

The business transactions between the railroad company and the Duquesne Company have been and are those of common carrier and shipper which did not bring the Duquesne Company within the scope of Section 1(a) of the railroad employment acts. The two companies were and are sufficiently separated. *United States* v. *Lehigh V. R. Co.*, 220 U. S. 257; *United States* v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492; *Portland Traction Co.*, 237 I. C. C. 647, 650.

The railroad company itself performed and performs all of the transportation services, specified in Section 1(a) of the railroad employment acts, on its own premises leaving none of such services for performance by the Duquesne Company.

The loading and unloading of railroad cars and the storage of merchandise by private industries, including warehouse companies, on their private premises, dissociated from common carrier service and duty, as is the case here, does not evince the performance of any transportation service within the meaning of Section 1(a) of the railroad employment acts. *Loading and Unloading*

Carload Freight, 101 I. C. C. 394, 396; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

A commingling of the business activities of the transporter and the trader, provided retirement act taxes are paid, as sanctioned in the findings of the Board, would create violations of the Interstate Commerce Act. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492.

6. ARGUMENT.

POINT I.

THE BOARD'S FINDINGS AND CONCLUSIONS ARE WITHOUT SUBSTANTIAL SUPPORT IN THE EVIDENCE.

(a) Contrary to the Board's Findings and Conclusions the Evidence calls for Findings that the Business Transactions between the Railroad Company and the Duquesne Company are those of Common Carrier and Shipper.

The failure of the Board to distinguish the transportation services, which are specified in fine detail in Section 1(a) of the railroad employment acts, from shippers' services, services which are a component of private business activities, is revealed clearly in the Board's summary of its findings as follows: (No. 95, R. 27-28)

> "As appears in our findings Duquesne is principally engaged in the following activities: (1) loading and unloading of carload freight transported over the Pennsylvania's lines, (2) receipt and delivery of carload freight, and less-than-carload freight transported over Pennsylvania's rails, (3) storage of goods under Pennsylvania's storage-in-transit privileges, (4) storage of goods coming in or going out, or both, over

Pennsylvania's rails and (5) handling Pennsylvania's damaged and over freight. In our opinion, all of these activities are clearly included within the language of Section 1(a) of the Act enumerating the activities which will qualify a carrier affiliated company an an employer.

"It is evident that the first three activities are performed in connection with the 'receipt', 'delivery', 'transfer in transit', 'storage' and 'handling' of property transported by railroad. In fact when Duquesne loads, and unloads, receives and delivers, stores and otherwise handles goods under Pennsylvania's storage-in-transit privileges it not merely performs services 'in connection with' transfer in transit but it *transfers in transit.* See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 526-527; *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, 577. * * *

"It is also clear, in our opinion, that under the circumstances of this case the functions and activities of Duquesne as to the storage of goods which are not in transit but which have been transported or are awaiting transportation over Pennsylvania's lines constitute services 'in connection with the transportation of * * * property by railroad.' * * *"

Contrary to the Board's findings these services are not railroad transportation services. The first two items, in the absence of exceptional and unusual conditions, are ordinary and customary shippers' services, i. e., private business activities. *Loading and Unloading of Carload Freight*, 101 I. C. C. 394, 396. *Merchants Warehouse Company* v. *United States*, 283 U. S. 501. The third and fourth items, commercial storage and so-called storage-in-transit of merchandise, as argued in our Points IV and V are also private business activities. The Board's summation is simply a recital of private business activities.

Of course these shippers' services are just as much "in connection with" motor truck transportation, which is not

covered by the railroad employment acts, as they may be "in connection with" railroad transportation. See the Board's finding No. 6. In either event they are shippers' services *per se* which stand erect on their own feet beyond the scope of the railroad employment acts. They were performed by the Duquesne Company, when functioning as a shipper, of its own volition on its own premises for its own benefit and profit. Every such shipper and its employees fall directly within the coverage of the Social Security Act. The term "in connection with" will not defeat this plain and direct application of the Social Security Act. In *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130, 133-135, C. C. A. Fourth Circuit, the court said that if Congress intended that steamship companies and their employees should be included under the special railroad insurance system instead of the general social security insurance system Congress could easily and would have said so. And we may properly remark—likewise as to warehouse companies and other shippers.

In No. 103 ten of the Board's findings, those numbered 3, 4, 5, 6, 7, 9, 10, 11, 13 and 14 constitute the whole factual foundation for the Board's conclusions in respect to the services performed by the Duquesne Company.

What is the evidence, if any, that supports these 10 findings? There was no public hearing at which witnesses were examined or cross-examined. The Board preferred to assemble the evidence by means of two questionnaires answered in writing by the Duquesne Company, and more particularly by two separate statements of facts submitted in writing by that company and two affidavits and their attachments. (No. 95, R. 58-99, 103-110, 131-139, 178-232.) Evidence of this kind has its advantages—it stands uncontradicted, and can have only the force and meaning which the respondent expressly attributed to it. Further, it enables the case to come before this court on facts which

are undisputed. The court is thus not shackled by the findings of the Board, but is at liberty to review the evidence and to determine the controversy as a matter of law. *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.

The lawful status of the Duquesne Company as a tenant in possession of the warehouse properties, for which it pays substantial rentals, stands unchallenged in the evidence and the findings of the Board.

Insofar as that evidence portrays other business transactions between the Duquesne Company and the Pennsylvania Railroad Company it can be concisely summarized as follows—the Duquesne Company's customers, functioning as consignors, tendered shipments of freight for transportation outbound by the railroad company and, functioning as consignees, accepted inbound shipments when they were tendered and delivered to the warehouses by the railroad company. The warehouses were the storage and shipping plants of these shippers. No divergence from the well-known similar functioning of a majority of the manufacturers, wholesalers and retailers in conjunction with railroad companies every business day throughout this country is evinced in this evidence.

There is no evidence that certain lots of merchandise, formed into carload or less-than-carload railroad shipments, passed through the warehouses of the Duquesne Company intact. The trade processing of the merchandise in the warehouses altered such railroad shipment assemblages and forbids the thought that the warehouses were agencies of the railroad company or its conduits for the delivery of inbound shipments by the railroad company directly and intact to unnamed consignees or for the direct tendering of outbound shipments by unnamed consignors to the railroad company. To the contrary, the warehouse company functioned as an agency of its own customers, such consignees and consignors, and provided their storage and shipping plant services.

As to less-than-carload shipments the railroad company itself unloaded the inbound shipments from, and loaded the outbound shipments into, the cars, thus conforming with ordinary and regular practice. And it does so now.

The Board's findings 5 and 6 show that the handling and storage activities of the Duquesne Company are services which are performed by it for the account of the shippers and owners of the merchandise and the charges for such services are billed by the Duquesne Company directly against and collected by it from these owners of the merchandise. Thus the warehouse activities stand out separate and distinct from, and additional to, the railroad transportation services which are performed at the published tariff rates of the railroad company. (No. 95, R. 22).

The complete absence of evidence to support these 10 findings is striking. There is no evidence whatever of a master and servant or principal and agent arrangement under which the Duquesne Company handles any of the railroad company's freight in the performance of a task laid down by the railroad company for performance by the Duquesne Company. There is no evidence that the Duquesne Company performs any services specified in Section 1(a) of the railroad employment acts which are included in the common carrier transportation duty of the railroad company. There is no evidence which tends to show that the business activities of the Duquesne Company, all of which are performed on its private premises and not on railroad premises, are not private business activities and that it and all of its employees are not properly within the coverage of the Social Security Act. There is no evidence relevant to Section 1(a) of the railroad employment acts, such as employment in railroad transportation services, or that the purpose of these acts will be served by including employees of private industry within the scope thereof.

Turning to finding of fact No. 1. The Board found that since its incorporation the Duquesne Company has been

directly and completely owned and controlled, through stock ownership, by the Pennsylvania Railroad Company. If the Board had adhered to the evidence it would have found that the railroad company owned all of the capital stock of the Duquesne Company which, in the decided cases, means far less than the Board found. *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257; *United States* v. *Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492. However, the ownership in this case is ownership by the railroad company of the capital stock of a warehouse company engaged exclusively in private business activities—an ownership which is beyond the scope of Section 1(a) of the two railroad employment acts.

Finding No. 2. The Board found that certain officers of the Duquesne Company are also officers of the railroad company. This is immaterial for the reasons stated in our review of finding 1.

Finding 8 indicates that under arrangements with the railroad company the Duquesne Company stores and sells the refused and unclaimed freight, of relatively small value in the aggregate, of the railroad company. But, without a word to indicate why that ordinary business transaction is relevant to the railroad employment acts, the Board proceeded to its unfounded conclusion that it is. We cannot discern the slightest relevancy in finding 8 to the railroad employment, retirement benefits or other purposes of the railroad employment acts. Whenever the railroads encounter the refusal of consignees to accept the delivery of transported carloads of perishable watermelons, strawberries or fruit will the commission merchant who undertakes the distressed sale be thereby converted into an employer under the railroad employment acts? The railroad employment acts do not evince legislative intention to transform such vendors of merchandise into railroad employers.

The Board's findings also are to the effect that the operations of the Duquesne Company are intimately and integrally related, and directly related, functionally and economically, to the operations of the railroad company. Findings 3 and 13. These vague terms are not relevant to Section 1(a) of the railroad employment acts. Valid findings must descend to the services which are specified in that section—the findings must show that the Duquesne Company "handled" or "elevated" freight, for and in the behalf of the railroad company, while the freight was in the possession of the railroad company. These vague, general phrases could also be applied to many manufacturers or wholesalers, not owned or controlled by a railroad company, who as ordinary shippers are dependent on some railroad company for essential transportation service.

That part of the Board's finding No. 9 which has reference to the subleasing, by the Duquesne Company, of space to manufacturing concerns rests on what is indisputably private business activities. As Section 1(a) of the railroad employment acts is confined to specified, and singled out, transportation services the Board does not have the broad *in personam* statutory authority to find that an owned company, if it is engaged both in private business pursuits and the performance of specified railway transportation services, is covered by the railroad employment acts as to all of its property, equipment and business activities. In such case the owned company would be covered in part by the Social Security Act and in part by the railroad employment acts and the allocation of its employment service must conform with Section 1426(c) of the Internal Revenue Code.[1] Here the Duquesne Company is engaged exclusively in private business. Nevertheless, transcending its statutory authority the Board found that the Duquesne Company

[1] For pay period allocations see Sec. 402.207 of Bureau of Internal Revenue Regulations No. 106.

was and is an employer under the railroad employment acts as to all of its business activities including the private business transactions between the Duquesne Company and the manufacturers. The Board is likewise in error in ignoring the application of the Social Security Act and treating the commercial storage and storage-in-transit services afforded by the Duquesne Company, which are private business activities, as being railroad transportation services—a question which we argue in our Point IV. These are not minor details for administrative rulings—Congress deliberately withheld all jurisdiction over private business under any and all conditions from the Railroad Retirement Board and, in the Social Security Act, gave such jurisdiction to the Social Security Board.

The remaining finding, No. 12, is not relevant to these cases which involve only the private business activities of a private industry.

The Board's findings, therefore, are arbitrary and invalid in that they derive no support from the evidence of record and are contrary to the evidence.

The Board's findings and conclusions in both No. 95 and No. 103 are based upon the same evidence. (No. 103, R. 89-90.) Three courts found that the evidence failed to substantiate the findings. In No. 103 the District Court of the District of Columbia on March 21, 1944. (R. 71-73.) In No. 95, the District Court of the Southern District of New York (R. 282), 56 F. Supp. 87, and the Circuit Court of Appeals, Second Circuit (R. 302), 148 F. 2d 473. The Court of Appeals of the District of Columbia, as stated in our argument of point III, accepted the findings of the Board in No. 103 at their face value without giving consideration to the sufficiency or materiality of the underlying evidence.

(b) The Board's Findings of Fact and Conclusions are contrary to (1) the Interstate Commerce Act, (2) the Evidence, and (3) the Filed and Published Tariffs of the Railroad Company.

The railroad company, owner of the physical warehouses at Pittsburgh and East Liberty which are equipped with private side tracks, leased this property to the Duquesne Company. (No. 103, R. 39.) The Duquesne Company, a private corporation, thereupon became the tenant of this property and the property became the private property of this private industry. We say private property as to the side tracks because the leasing provided the equivalent, in rights, which the Duquesne Company was entitled to under the private side track provisions of Section 1(9) of the Interstate Commerce Act, part b. (No. 95, R. 134.) The Duquesne Company, therefore, did not and does not operate any equipment or facility, devoted to the transportation services of the railroad company. It assumed the status accorded to shippers in Section 1(9) of the Interstate Commerce Act. *Schlicher* v. *Director General*, 62 I. C. C. 179, 187; *Los Angeles Switching Case*, 234 U. S. 294. And the valuation report of the Interstate Commerce Commission classified this property as non-transportation property. (No. 95, R. 139.) The business transactions of the Duquesne Company with its customers are covered by standard negotiable and non-negotiable warehouse receipts which conform with the statutes of the Commonwealth of Pennsylvania. (No. 95, R. 133, 168-169.) None of the business activities of the Duquesne Company with its customers were conducted under the terms of the uniform railroad bill of lading.

The services described in the Board's findings 5 and 6 are not railroad transportation services, and necessarily are private business activities by virtue of Rules 23 and 27 of

the railroad company's Consolidated Freight Classification. Neither the Board nor the Pennsylvania Railroad Company has authority to change or alter that unyielding condition. The railroad tariffs while in force are as rigid as a statute. *Pennsylvania R. Co.* v. *International Coal M. Co.*, 230 U. S. 184, 197; *Davis* v. *Henderson*, 266 U. S. 92. Only the Interstate Commerce Commission, after hearing, can alter railroad tariffs in the manner here attempted by the Board without statutory authority.

The duties of the railroad company and the Duquesne Company, respectively, in handling the freight of the Duquesne Company to and from the railroad cars on the side tracks at the warehouses is set forth in Rule 27 of the Consolidated Freight Classification of the railroad company, its filed and published tariff, which reads as follows (No. 95, R. 135):

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier."

The evidence shows that the two parties complied with Rule 27. (No. 95, R. 134, 136.)

The shipments of freight to and from the warehouses of the Duquesne Company are covered by the uniform bills of lading of the railroad company. (No. 95, R. 134-135, 170-171.) One of the clauses of the bills of lading obligate the common carriers to transport the shipments to or from the customary place of shipment and delivery. (No. 95, R. 170-171.) And the evidence shows that the side tracks at the warehouses are the customary place. (No. 95, R. 134.) Another clause in the bills of lading (No. 95, R. 170) provided that the bills of lading are subject to the railroad company's classifications and tariffs, which includes Rule 27.

Rule 27 and the bills of lading prescribe the duties of the railroad company, as the common carrier, and the duties of the Duquesne Company and its customers as the consignors and consignees of shipments, and these duties meet on the said side tracks. And Rule 27, applicable there in conjunction with the bills of lading draws a clear line of demarcation between the common carrier duty and service of the railroad company and the shippers' services, or private business activities, of the Duquesne Company. As to outbound shipments the railroad company's transportation duty is initiated on the side tracks at the platforms outside the warehouses and as to shipments inbound to the warehouses common carrier duty ends there. Such duty, which does not even include the loading or unloading of cars containing freight transported at carload rates, cannot properly be projected beyond the side tracks into the warehouses and the offices of the Duquesne Company, as is the purport of the Board's findings. *Merchants Warehouse Co. v. United States*, 283 U. S. 501. Such stretching of common carrier duty would nullify the uniform bills of lading and classification Rule 27. As heretofore stated the warehouse company's services are separated from and are additional to the railroad transportation services at railroad tariff rates and are paid for as such additional services by the warehouse company's customers.

The Interstate Commerce Commission has ruled that the loading and unloading of carload freight is a shipper's duty not embraced in common carrier duty and not covered by railroad freight rates, *Loading and Unloading Carload Freight*, 101 I. C. C. 394, and the Board is without statutory authority enabling it to annul that ruling. Undoubtedly the shifting of the burden and large expenses of that service from the shippers to the carriers, even if the proposal is practicable, would compel a widespread revision of railroad freight rate structures.

The separation of common carrier duty and private business at and on the side tracks is clear cut and indisputable. This evidence requires findings that the Duquesne Company is engaged exclusively in private business activities and that it did not and does not perform any railroad transportation services within the meaning of Section 1(a) of the railroad employment acts. There is additional evidence but there is no need to review it—we have gone far enough to prove our point conclusively. This whole chain of evidence is the product of the Interstate Commerce Act. The prescribed uniform bills of lading, *Bills of Lading*, 52 I. C. C. 671. The tariff rules and rates, see Section 6 of the Interstate Commerce Act. And it is the duty of the Interstate Commerce Commission to prescribe the character and quantum of the transportation services to be performed by common carriers subject to the Interstate Commerce Act as well as the freight rates that will cover such services. *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 407; *United States* v. *Pan American P. Corp.*, 304 U. S. 156, 157-158. These cases show that transportation rates cannot be prescribed to cover services or business activities which are *per se* private business activities. In fact a separation of common carrier duty and private business necessarily must be made and enforced.

The Interstate Commerce Commission, having the duty to prescribe just, reasonable and compensatory railroad freight rates and the services covered by such rates is the only Federal agency which has statutory authority to decide after a public hearing on the question under the Interstate Commerce Act, whether, as a departure from well settled custom and practice, the common carrier transportation duties and rates of the railroad company may be altered, changed and projected into the warehouses and offices of the Duquesne Company. The Board, having no

statutory authority in the premises, has decreed this projection. The Board's findings are clearly arbitrary and invalid.

Closing the argument of our point I we submit that the Board's findings and conclusions being without substantial support in the evidence and contrary to the uncontradicted evidence and reflecting errors of law are arbitrary and invalid. *Chicago Junction Case*, 264 U. S. 258; *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 442. And the action of the Board in reversing the meaning of a mass of uncontradicted evidence, holding that that evidence which proved common carrier and shipper business transactions established principal and agent relations, nullified the value of the submissions in these cases. Time and expense would have been conserved if the Board had, without such submissions, imposed predetermined conclusions. The requirement of fairness extends to the concluding parts of the procedure as well as the beginning and intermediate steps. *Morgan* v. *United States*, 304 U. S. 1, 20.

The foregoing has reference to the findings of the Board in No. 103. The Board's findings and conclusions in the two cases are based on the same evidence (R. 103, R. 89-90) and are so clearly alike that, without reviewing each of the 14 findings in No. 95, we can say that the errors which we attribute to No. 103 apply with like force to the Board's findings and conclusions in No. 95. These errors, it is submitted, require rejection of the Board's findings and conclusions in both cases; affirmation of the opinion of the Court of Appeals of the Second Circuit in No. 95 and reversal of the opinion of the Court of Appeals of the District of Columbia in No. 103, and affirmance of the judgment of that District Court.

POINT II.

THE JUDGMENT OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA SHOULD BE REVERSED AND THAT OF THE DISTRICT COURT AFFIRMED.

The opinion of the Court of Appeals of the District of Columbia has only such strength as is afforded by the invalid findings of the Board. The court accepted the findings at their face value without inquiring into the sufficiency of the evidence underlying the findings. As heretofore stated these findings which are contrary to the evidence and without support in the evidence, are arbitrary and invalid.

The major part of the facts which are referred to by the Court of Appeals, District of Columbia, center on the loading and unloading of railroad cars at the Duquesne Company's warehouses and the storage of freight by the Duquesne Company including so-called "storage in transit". The court erroneously treated these shippers' services, private business activities of the Duquesne Company, as being common carrier transportation services of the Pennsylvania Railroad Company.

The Court of Appeals, District of Columbia, quoted part of the opinion of this Court in *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, as proof of the fact that the railroads customarily engage in the commercial storage of freight in connection with their transportation operations. Upon turning to the evidence of record in the case at bar we are unable to find that any evidence tending to prove that fact was offered or submitted. The Court of Appeals evidently misconstrued the significance of this Court's opinion in that case which was affirmation of the reports of the Interstate Commerce Commission in *New York Warehousing*, 198 I. C. C. 134, and 216 I. C. C. 291. The Commission, after an exhaustive investigation, condemned certain practices of railroad companies in the Port of New

York District. The outcome was a corrective order. (305 U. S. 507, 513, 515). Therefore a review of the Commission's reports, and the opinion of this Court sustaining the reports, will readily disclose condemnation therein of isolated unlawful storage practices and not, as the Court of Appeals erroneously found, commendation of the performance of standard or customary transportation storage services by the railroads.

The court also failed to note a very material divergence of the facts in the case at bar from the facts in the New York Warehousing cases. In the case in hand a private industry, the Duquesne Company, performs commercial storage for its own customers on its private premises under proper trade and barter arrangements not involving any common carrier tariff rates, services or duties. The Pennsylvania Railroad Company did not at any time offer or profess to perform any such services.

In the New York cases a substantial part of the storage was performed by the railroad companies on their lighterage piers because, at certain times, they seemed to have surplus or unused facilities available for such storage purposes. The railroad companies had uninterrupted possession of the freight on their own premises both for storage and transportation. In the case in hand the jurisdiction of the Railroad Retirement Board over such railroad employees employed on railroad premises has not been challenged. But the storage of merchandise in the case in hand is very different—it is storage afforded by a private industry on its private premises as a component part of its private business for which it utilized the services of its own employees. In the New York cases there were also instances in which the freight was stored by commercial warehouse companies. The decisions in the *New York Warehousing* case do not afford any support to the proposal of the Railroad Retirement Board to transform all of the

private business activities of the Duquesne Company into railroad transportation services insofar as that impossible feat can be accomplished through administrative rulings.

On the errors set forth above it is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed and that of the District Court affirmed.

POINT III.

THE RAILROAD COMPANY ITSELF PERFORMS THE TRANSPORTATION SERVICES, WHICH ARE MENTIONED IN SECTION 1(a) OF THE RAILROAD EMPLOYMENT ACTS, LEAVING NONE FOR PERFORMANCE BY THE DUQUESNE COMPANY.

All of the line haul and terminal services required to effect the placement of the loaded and empty railroad cars on the side tracks at the two warehouse plants and the removal of the cars therefrom are performed by the Pennsylvania Railroad Company itself. That accomplishes the complete performance of all transportation services embraced in common carrier duty and leaves no opportunity for the Duquesne Company to perform any transportation service on its premises. The railroad company can not do more, or less or anything different without violating Section 6(7) of the Interstate Commerce Act, Part I. *Los Angeles Switching Case*, 234 U. S. 294.

Whatever delivering, elevation, storage, handling or terminal service which is commanded by the freight traffic is performed by the railroad company and the complete force of Section 1(a) of the railroad employment acts is exerted and exhausted on that performance of every service within the scope of that section. Can that section be construed to have additional applications without limitation to a succession of storage or handling services by private industries on private premises on merchandise beyond the custody and control of the common carrier?

The Board and the Court of Appeals of the District of Columbia attributed such additional and secondary ultra transportation force to the term "storage or handling of property transported by railroad" in Section 1(a) of the Railroad Unemployment Insurance Act.

As to shipments of the Duquesne Company inbound to the warehouses the stored and handled freight had been delivered to the consignee and completely dissociated and separated from railroad transportation service by the complete performance of the bill of lading contract of carriage; by execution of the customary delivery receipt and by the operation of Rule 27 of the Consolidated Freight Classification. As to possible outbound shipments the storage and handling services were afforded merchandise on private premises to which no semblance of railroad transportation could then be attributed. If such merchandise ever was to be afforded transportation outbound from the warehouses in the future it might be tendered for transportation by private carriage or motor trucks not subject to the railroad employment acts or it might go out via the railroad company's lines. But the respect in which Section 1(a) can attach to the storage of merchandise in commercial warehouses preceding shipment has not been pointed out in the conclusions of the Board or the Court of Appeals of the District of Columbia.

Sanctioning the ultra transportation meaning the Court of Appeals of the District of Columbia said (No. 103, R. 84-85):

> "This strained construction of the language (*of Section 1a*) is rendered even more difficult by the fact that the act includes 'service in connection with * * * storage or handling of property transported by railroad.' The participle 'transported' is certainly in the past tense. Appellee (*the Duquesne Company*) answers that by interpretation we must change the word 'transported' to 'being transported'. This gets the desired result but it incidentally compels us to

limit the term 'storage' to enclosure in moving freight cars. This seems more ingenious than plausible." (Words in italics ours.)

The past tense meaning thus approved by the Court sanctions the secondary ultra transportation successive applications of each one of the eight transportation services, including elevation, delivery, storage and handling of property transported by railroad, which are specified in Section 1(a) of the railroad employment acts. However, the statutory terms are not susceptible to both a present tense and a past tense meaning—it must be only one or only the other. This past tense meaning will shrink the application of the statutory terms to the inconsequential tonnages of freight handled by the subordinate agencies, the few controlled companies, after the inbound shipments have been transported by the carriers and delivered to the controlled companies.

The whole text of the statute warrants the present tense interpretation. *Allen* v. *Ocean S.S. Co. of Savannah*, 123 F. 2d 469, 471, C. C. A. Fifth Circuit; *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130, 132-135, C. C. A. Fourth Circuit.

The specification of the several enroute and terminal services in Section 1(3)(a) of the Interstate Commerce Act, Part I, was not intended to give that statute an ultra transportation application but was for the purpose of assembling all of those services within the scope of that statute. *Cleveland & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *American Paper & Pulp Asso.* v. *B. & O. R. R. Co.*, 41 I. C. C. 506, 512. The specified terms evince tautology but not enlargement of the prior transportation terms of the statute. *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208, 226. The same terms incorporated later in Section 1(a) of the railroad employment acts should receive a similar interpretation.

When we trace the statutory term "transportation" back to its origin in the initial sentences in Section 1 of the Interstate Commerce Act, Part I, we find that it contemplates the actual conveyance of merchandise from one state to another by railroad. There are services which are conspicuously transportation services *per se* such as the line-hauls of merchandise performed by railroad companies. And there are services which are indisputably private business activities *per se* such as cold storage warehouse functions and the long term storage of merchandise in commercial warehouses from the harvesting season to the marketing times dissociated from the functions of the transporters and solely for the purposes of the traders. It is axiomatic that a line haul is an essential ingredient of any and every transportation service—the service could not be transportation at all in the absence of the line haul. To constitute interstate transportation service taking application of Section 1(a) of the railroad employment acts the line haul must cross some state line. The services "receipt, elevation, storage and handling of property transported by railroad" etc., specified in Section 1(a) of the railroad employment acts, are transportation services only when performed in conjunction with line hauls and only while the line haul railroad company has actual or constructive possession, and the right of possession, of the freight afforded the services. When the freight, before or after railroad transportation, is stored or handled by a warehouse company on its private premises, that is private business activity dissociated from line hauls, and every ingredient of railroad transportation and common carrier custody, and, despite any tautological or grammatical error in the statute, completely beyond the scope of Section 1(a) of the railroad employment acts which is expressly and repeatedly confined to bona fide common carrier transportation services.

POINT IV.

CONTRARY TO THE BOARD'S FINDINGS COMMERCIAL STORAGE AND SO-CALLED STORAGE-IN-TRANSIT ARE NOT TRANSPORTATION SERVICES BUT ARE PRIVATE BUSINESS ACTIVITIES.

The various services specified in Section 1(a) of the railroad employment acts, a reproduction of the same terms in Section 1(3)(a) of the Interstate Commerce Act, may be transportation services when performed by railroad companies but they are private business activities when performed, as they are every day, by private industries. Even the ordinary householder receives, stores, refrigerates and handles merchandise that has been transported by railroad or by rail express agencies. Hence the many decisions under the Interstate Commerce Act pointing out when such services are railroad transportation services and when they are private business activities. In our Point V we argue that these decisions are and should be controlling in the cases at bar.

The Board's conclusions, as quoted in our Point I, unmistakably and unequivocally show that the Board deems any owned company to be an employer within the meaning of Section 1(a) of the railroad employment acts, when that company stores or handles any merchandise or loads or unloads the merchandise to or from railroad cars provided the merchandise has been or may be transported by railroad at any time.

The Board's findings as to storage are very disturbing. Under Section 1(a) of the railroad employment acts it is the character of the services performed, and not the form or substance of ownership or control, that is determinative.

Apparently the Board so admits. (No. 95, R. 31) If the storage services performed by an owned company are private business activities *per se* then the owned company, as a matter of plain statutory construction, belongs under the Social Security Act. It is only when such storage is found to be a common carrier transportation service *per se* that the finding can exert enough force to transfer the owned company from coverage by the Social Security Act to coverage by the railroad employment acts. Section 1(a) of the railroad employment acts does not afford grounds for a conclusion that commercial storage performed by an owned or controlled company can be a railroad transportation service while identical storage performed by a commercial warehouse company nearby, not owned or controlled by any railroad company, is not railroad transportation service and is private business activity. This conspicuous inconsistency stands without a word of explanation in the Board's findings and opinion. Hence our fears as to future rulings of the Board which might evince additional expansions of the meaning of the statutory term "storage" and our preference for the present settled and well-known interpretations of the meaning of that term under the Interstate Commerce Act.

As to loading and unloading of carload freight the Interstate Commerce Commission in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 396, has stated the general rule and the very few exceptions thereto. The case in hand is not one of the few exceptions. (No. 95, R. 135) The general rule is that such loading and unloading services are shippers' services—private business activities not embraced in common carrier duty. The general rule will stand, despite any rulings of the Board to the contrary, unless and until and then only to the extent that it may be changed in formal proceedings before the Interstate Commerce Commission under the Interstate Commerce Act, part I.

In reviewing the decisions it should be borne in mind that Congress, in Section 15(5) of the Interstate Commerce Act, enacted a special statutory provision charging common carriers by railroad with the duty of loading and unloading live stock to and from railroad cars under certain conditions. This special statutory provision substantiates our statement of the general rule stated above.

ORDINARY STORAGE.

Now taking up the question, in the light of the term "storage" in Section 1(a) of the railroad employment acts and Section 1(3)(a) of the Interstate Commerce Act,—what kind of storage did Congress intend to include within the meaning of that statutory term?

As stated heretofore the Interstate Commerce Commission is charged with the important and heavy duty of prescribing just, reasonable and compensatory railroad rates and the character and quantum of the transportation services to which the prescribed rates will be applied. Upon complaint the Commission must decide whether railroad storage charges are, or are not, just and reasonable. In the exercise of its powers and the performance of its duties the Commission has repeatedly decided what kind and character of storage is a component part of common carrier railroad transportation duty and what kind and character of storage is a constituent part of private business pursuits. There are a large number of decisions on this question by the Commission and many by the Federal Courts. We shall refer to only a few. *B. & O. R. Co.* v. *United States*, 305 U. S. 507; *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259; *Pennsylvania R. R.* v. *Kittanning Co.*, 253 U. S. 319; *American Wholesale Lumber Asso.* v. *Director General*, 66 I. C. C. 393, 397; *Eastern Shore Produce Exchange* v. *P. R. R. Co.*, 144 I. C. C. 401,

409; *Nutile Fruit Co.* v. *Boston & M. R.*, 156 I. C. C. 87, 91; *Eastern Shore, etc.* v. *Pennsylvania R. Co.*, 179 I. C. C. 642, 649.

Many years ago the Interstate Commerce Commission in *Re Demurrage Investigation*, 19 I. C. C. 496, 498, decided on November 14, 1910, said:

> "The business of a railroad is transportation, not storage."

In *American Paper & Pulp Asso.* v. *B. & O. R. Co.*, 41 I. C. C. 506, 511, 512, decided November 6, 1916, the Commission, construing what is now Section 1(3)(a) of the Interstate Commerce Act, part I, said:

> "In order to prevent overcharges and discriminations under the pretext of additional services, Congrss enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term 'transportation' and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend 'any privileges or facilities,' save as these have been duly specified. But the primary duty of a carrier is to carry. And it is not the duty of a carrier, as such, to furnish storage beyond the reasonable time necessary for unloading or removal. *Cleveland & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588; *Southern Ry.* v. *Prescott*, 240 U. S. 632; *Peale, Peacock & Kerr* v. *C. R. R. Co. of N. J.*, 18 I. C. C. 25, 35; *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 56.

In *Dakota Monument Co.* v. *Director General*, 59 I. C. C. 101, 103, 104 the Commission said:

> "We have frequently had occasion to say that the storage of shipments beyond such time as may be required to afford shippers a reasonable opportunity to

remove them is no part of the duty of a common carrier; and we have consistently held that carriers might impose such charges as would promote the removal of freight from their premises. In a number of cases we have sanctioned charges similarly based upon an ascending scale. The clearing of carriers' terminals is the primary object of a storage charge, and a charge which goes no further than is necessary to accomplish this end is not unreasonable from the mere fact that it is higher than would be just if the value of the storage service were the only element to be considered."

In *New York Warehousing*, 216 I. C. C. 291, 348, 349, decided on June 8, 1936, the commission said:

"*Commercial nature of storage here involved.*—Numerous consuming points of the commodities previously mentioned are located within comparatively short distances from the Port of New York district. Present-day commercial necessities in the distribution of goods to a densely populated section require large amounts of warehouse space as a storage reservoir from which the goods may be drawn promptly and economically for consumption. It is a distinct commercial advantage to dealers and manufacturers to have storage facilities available at a central distributing point, rather than at scattered points, and commercial reasons account for the large tonnage of goods stored in the above district.

"Involuntary storage is a part of the transportation service defined in section 1 of the Interstate Commerce Act. Other storage, voluntary or commercial in nature, is not included within the term 'transportation' as there used. Prior report, page 139. Where it is sought to distinguish between two things which have qualities inherent in both, the use of single words or short phrases which do not draw the distinction precisely frequently leads to confusion of ideas. There are many services and acts, including storage and handling of goods, which are necessary in or incidental to the

conveyance of goods by rail from one locality to another, which are not a part of transportation as defined in section 1. A clear distinction should be made between voluntary or commercial storage ordinarily performed by a warehouse, and the involuntary storage which carriers subject to the act are obligated to perform. *State* v. *Southern Pac. Co.*, 52 La. Ann. 1822, 28 So. 372. Our duty, under the circumstances here involved, requires us to determine when transportation as defined in the act begins and ends, and to determine whether acts or services incident to the conveyance of goods from one point to another are or are not a part of transportation which common carriers subject to the Interstate Commerce Act are obligated to perform. Such matters are questions of fact.

"The business of a railroad is transportation, not storage. *Demurrage Investigation*, 19 I. C. C. 496. Storage of property transported is a transportation service only to the extent that the storage is necessarily incidental to transporting such property, and the term is used in section 1 in that limited sense. *Guaranty Claim of Central Elevator & Warehousing Co.*, 72 I. C. C. 169."

In that case the Interstate Commerce Commission decided that commercial storage in the New York District is not railroad transportation service. In the cases in hand the Railroad Retirement Board decided that commercial storage in the Pittsburgh District is railroad transportation service. These two diametrically opposite conclusions arise from interpretations and applications of statutory terms that are identical—the provisions of Section 1(3)(a) of the Interstate Commerce Act in the first instance and of Section 1(a) of the railroad employment acts in the latter one. This court sustained the Commission's report. *B. & O. R. Co.* v. *United States*, 305 U. S. 507.

From the cases cited it appears that, in respect to railroad freight traffic bona fide common carrier storage is an

incidental service, performed or afforded involuntarily by the railroads, which emanates from unavoidable incidents and circumstances attending their performance of transportation, their principal function. Storage is the antithesis of transportation. To avoid storing merchandise for shippers the railroads customarily impose exceptionally high storage, demurrage and track storage charges which are commonly referred to as penalty rates. *Turner, Dennis & Lowry Lumber Co.* v. *C. M. & St. P. Ry.*, 271 U. S. 259. If a consignee fails to unload his carload of goods promptly from the railroad car, if any consignee does not promptly accept the delivery of his carload or less-than-carload shipment, or if delays in the berthings of steamships impede the interchange of freight traffic, the railroads are thereby compelled to store the transported goods involuntarily for a temporary but usually short period of indefinite duration.

A clause in the uniform bills of lading prescribed by the Interstate Commerce Commission, *Bills of Lading*, 52 I. C. C. 671, for railroad companies is intended to relieve the railroads from long and burdensome storage of merchandise which they are unable to deliver to consignees promptly. To avoid this burden the clause enables the railroads to deliver the merchandise to a public or licensed warehouse company for storage. Such use of the clause was approved by the Commission in *Milne Lumber Co.* v. *Detroit, G. H. & M. R. Co.*, 159 I. C. C. 688, 689, in which the Commission said:

> "Section 4(a) of the bill-of-lading contract provides:
>
> 'Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination * * * has been duly sent or given, and after placement of the property for delivery at destination has been made, may * * * at

> the option of the carrier * * * be removed to and stored in a public or licensed warehouse at the place of delivery * * * at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.'
>
> "The evidence of record shows that defendant complied with the tariff rules; that complainant failed to dispose of its shipment within the free time allowed; and that defendant, in placing the shipment in storage, did nothing more than was provided in the bill of lading contract."

It appears therefore that instead of offering or professing to perform commercial storage the general rule is that the railroads expressly disclaim that obligation or duty. The divergence of the unwelcomed common carrier storage duty or burden from private business commercial storage is sharp and conspicuous. The commercial warehouse company welcomes storage business, its principal function, and those seeking storage can get all they want from that company—large quantities and long periods preferred. *New York Warehousing*, 198 I. C. C. 134; 216 I. C. C. 291. But, of course, this ultra transportation storage merits separate compensation over and above railroad transportation freight rates.

In the cases in hand there is an array of evidence which shows convincingly that the storage and handling services performed by the Duquesne Company are outside the scope of Section 1(a) of the railroad employment acts. These services are not performed by a common carrier; or in the behalf of a common carrier; or on railroad premises; or on merchandise in the possession, custody or control of a common carrier; or as a component of the common carrier transportation duty or under the terms of the uniform bill of lading of a common carrier. And the warehouse services

were ordered and paid for by the owners of the stored merchandise over, above and in addition to any railroad rates assessed by the railroad company for its separate transportation services.

The storage and handling services of the Duquesne Company are performed voluntarily by a private industry on its private premises as a constituent part of its private business activities under its warehouse receipt and private contracts with its customers for whatever storage they desire. And the terms of the uniform railroad bill of lading and Rule 27 of the Consolidated Freight Classification preclude the inclusion of any of this storage and handling service in common carrier duty. As stated common carrier duty is initiated or ended on the side tracks at and outside the warehouses—evidencing an exceptionally clear cut separation of common carrier duty from the private business activities of the warehouse company.

The Duquesne Company is a private corporation. (No. 95, R., 133) Commercial warehouse companies are distinctively private business concerns. They, like other private business concerns, cannot condemn private property for public use and they are not protected from competition by certificates of public convenience and necessity. Like retail grocers they serve a selected group of customers under the customary trade and barter arrangements and are not compelled to respond to all demands for service. Under the standard tests they are not common carriers for hire or reward. *Tap Line Cases*, 234 U. S. 1, 26. The private business activities, or trade services, of this company cannot, through administrative rulings, be converted into railroad transportation services. *Peavey & Co.* v. *Union Pac. R. Co.*, 176 Fed. 409, 419; *Great Northern R. Co.* v. *Minnesota*, 238 U. S. 340, 345, 346. The incongruous grouping of these private industries with the railroads, under the railroad employment acts, through administra-

tive rulings designed to unduly expand the special railroad employees' insurance plan, would worsen what is now an unsound grouping of a selected class of common carriers by railroad. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330.

STORAGE IN TRANSIT.

Now turning to so-called storage-in-transit which generally means storage afforded by private industries or shippers on private premises enroute during periods in which transit or transportation by common carriers is suspended. For convenient expression the term has been distorted so that it indicates the very opposite of the actual fact—the merchandise is in fact stored while it is not in transit.

In No. 103, findings of fact Nos. 3, 5, 7, 9 and 10 of the Board, and the opinion of the Court of Appeals of the District of Columbia stress "storage in transit" which is performed by the Duquesne Company as being strong evidence of the participation by that company in the railroad transportation service of the Pennsylvania Railroad Company. The warehouse revenues emanating from this storage are featured in the Board's finding No. 9 and in the opinion of the Court in tabular form. And this item is further emphasized in the opinion of the Board as quoted in our argument of our Point I. There can be no doubt of the great evidentiary force attributed to this so-called storage-in-transit by the Board and the Court.

We attribute error to the Court and the Board on the grounds that such storage, which is customarily performed by private industries, during transit periods specified in the railroad tariffs, is not railroad transportation service but, to the contrary, is and for many years has been an activity of private industry in carrying on its private busi-

ness pursuits. It has been so treated by the courts and the Interstate Commerce Commission throughout a period of many years. Here again irreconcilable conflict between the Board's findings and the rulings of the Interstate Commerce Commission on storage is manifested.

A transit tariff of the Pennsylvania Railroad Company, Exhibit H, is in this record (No. 103, R. 172, 134). This tariff, on its face, shows that it is an offer by the railroad company of transit privileges to innumerable shippers at various cities and districts on the railroad lines. In other words the shippers may elect to accept this offer of transit privileges, or any of them may refrain from such acceptance, but those shippers who do accept thereby function as shippers on their own premises performing their own services. They do not become agents of the common carrier to perform common carrier transportation services on railroad premises or under railroad supervision.

As to any shipper who elects to utilize the tariff transit privilege the railroad companies will transport the carload shipments of that shipper, and it may be a group of shippers, from a certain point of origin to an intermediate point called a transit point and from thence to the ultimate destination determined by the shipper. The railroad companies move the shipments in sealed cars in carloads to the transit point; permit the shippers to unload the freight therefrom and take possession of the merchandise and to store or process it on their own premises or other premises which they select and later permit the shippers to reload the freight in its original or a processed form into railroad cars at the transit point and then the railroads will transport the sealed carloads of goods to the ultimate destinations. Under the transit privilege the railroads impose their through carload rates from the point of origin to the ultimate destination, which is usually lower than the combination of local carload rates to and beyond the transit

point that would be applicable in the absence of the transit privilege. *B. & O. R. Co.* v. *United States*, 305 U. S. 507, 517, 519, 525; *Cottonseed, Its Products and Related Articles*, 188 I. C. C. 605, 646, 647; *Grain and Grain Products*, 205 I. C. C. 301, 348, 349; *Transit Case*, 24 I. C. C. 340; *Fabrication-in-Transit Charges*, 29 I. C. C. 70.

In *New York Warehousing*, 216 I. C. C. 291, 349, the Commission said:

> "We pointed out in the prior report that ordinarily the transit privilege granted in connection with the transportation of goods is for the purpose of permitting milling, manufacturing, or similar processing of the goods. The underlying principle of all transit arrangements is that the same commodity which moves to the transit point shall move therefrom in a more or less changed form. *Maley & Wertz* v. *Louisville & N. R. Co.*, 36 I. C. C. 657. The holding or storing of the goods, therefore, is incidental to the main or primary purpose of performing the milling, manufacturing, or similar process.
>
> "So far as this entire record shows, none—or practically none—of the westbound goods stored under the present tariffs are held to permit a milling, manufacturing, or other similar trade process to be performed, but are held in that convenient locality awaiting a time when it will be to the commercial interest of the owner to sell or further ship the goods. This is clearly proven by the fact that the transit period has been extended from time to time by the respondents because of inability of the owner of the goods to dispose of them, by reason of economic conditions. The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function. *Reconsigment and Storage of Lumber and Shingles*, 27 I. C. C. 451."

Common carrier transportation duty consists of the publication of the transit privilege in the railroad tariffs, the movement of carloads of goods in sealed cars to and beyond

the transit point, and the keeping of appropriate records thereof. The common carrier activity would be more accurately described if it was referred to as "stopping" carload shipments in transit. It should also be noted that all storage and other handling or processing of the freight at the transit points, in the transit tariffs which are in evidence, is expressly left to the field of private business activities of the shipper who elects to take advantage of the transit privilege. It is a privilege voluntarily granted by carriers to shippers. It is not common carrier duty. *Central R. Co. of N. J.* v. *United States*, 257 U. S. 247.

The whole theory of transit privileges becomes clearer when we consider milling in transit. Milling in transit privileges permit the stoppage of a carload of grain at the transit and milling point enroute to be there ground into flour and the reshipment of the flour to its ultimate destination as stated above. *Transit Case*, 24 I. C. C. 340; *Larabee Flour Mills Co.* v. *Chicago, B. & Q. R. Co.*, 223 I. C. C. 55; *Northern Milling Co.* v. *Chicago & N. W. Ry. Co.*, 246 I. C. C. 499. Obviously the grinding of grain into flour is *per se* an activity of private business and is not a railroad transportation service. In granting milling in transit privileges the railroads customarily allow a period of twelve months for the exercise of the privilege. A long period of storage is thus granted in relation to milling in transit privileges. Transit privileges are also granted to steel mills for the fabrication of steel, and to saw mills for the dressing of logs and lumber.

The findings of the Board and the opinion of the Court of Appeals of the District of Columbia in respect to transit privileges are, not only contrary to the many decisions under the Interstate Commerce Act cited above but are also in sharp conflict with established business practice as disclosed in the decisions.

Section 1(a) of the railroad employment acts evinces the laudible purpose to exclude casual service and employment therefrom. Of course permanency in bona fide railroad employment was an essential and conspicuous feature of the whole special railroad employment insurance plan when it was being processed through congressional channels. Storage-in-transit is one of the most sporadic of casual services—insofar as the railroads are concerned it can be abrogated any day by merely cancelling the pertinent railroad tariff provisions; and the privilege is utilized by shippers only when its use suits their fancy.

We submit that ordinary commercial storage and so-called storage-in-transit are private business activities and are not railroad transportation services covered by the railroad employment acts.

POINT V.

THE TRANSPORTATION TERMS IN SECTION 1(a) OF THE RAILROAD EMPLOYMENT ACTS AND THE SAME TERMS IN SECTION 1(3)(a) OF THE INTERSTATE COMMERCE ACT SHOULD BE CONSTRUED TO HAVE THE SAME MEANING.

Supplementing our argument in our Points III and IV we desire to show additional grounds for our contention that interpretations of Section 1(3)(a) of the Interstate Commerce Act, part I, and Section 1(a) of the railroad employment acts should be harmonious.

Section 1(3)(a) of the Interstate Commerce Act, part I, reads in part as follows:

> "The term transportation as used in this part shall include locomotives, cars and other vehicles, vessels, and all instrumentalities of shipment or carriage, irrespective of ownership or of any contract express or

implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

That is the first assemblage of the eight terms in statutory form which we have discovered. The eight terms are (1) receipt, (2) delivery, (3) elevation, and (4) transfer in transit, (5) ventilation, (6) refrigeration or icing, (7) storage and (8) handling of property transported. These terms have been in the Interstate Commerce Act, and the preceding statute known as the Act to Regulate Commerce for more than 35 years. They have recently been incorporated in the Railway Labor Act, the Carriers' Taxing Act, and the two railroad employment acts. Difference in parts of the texts of these statutes as mentioned in the Board's opinion in the case under No. 95 (R. 31-44) may be material in the consideration of questions not involved herein, but such differences are not material here on the question in hand—does that assemblage of eight terms apply only to transportation services performed within the confines of common carrier duty or does it have ultra transportation application to private industries, private premises and private business activities?

With inconsequential exceptions the assemblage of terms in the railroad employment acts is an exact reproduction of the assemblage of the eight terms in the present Interstate Commerce Act, part I, and its predecessors, including even the punctuation and grammatical errors. One exception is that the term "ventilation" in the Commerce Act was omitted from the railroad employment acts. The other exception is that the term "storage and handling of property transported", in the Commerce Act, has the addition of the two words "by railroad" in the railroad employment acts which manifest that much additional confinement of

the railroad employment acts to railroad transportation service. We may properly assume that Congress intended that the terms in the railroad employment acts would receive the same interpretations that have been accorded to these terms in court and Commission decisions under the Interstate Commerce Act. There can be no doubt that when Congress incorporated the term "storage" in the railroad employment acts it meant only transportation storage, not commercial storage, as then well settled in court and Commission decisions. *United States* v. *Merriam*, 263 U. S. 179, 187.

The line of demarcation between common carrier duty and shippers' services, which are activities of private business, has been drawn, and has remained settled for many years, in accordance with the provisions of the Interstate Commerce Act. Railroad transportation services, classifications, tariffs and rates and shippers' facilities and duties have been adjusted thereto. As to these matters, to avoid confusion, administrative rulings and findings under both statutes should, we submit, be similar and should conform with what has been settled law for many years under the Interstate Commerce Act.

The findings of the Board under the railroad employment acts in this case are to the effect that, merely because the railroad company owns the capital stock of the Duquesne Company, a private industry, all of the business activities of the private industry are common carrier railroad transportation services. But in fact they are not such services. Of the three statutes a much broader test as to the character of service performed is afforded by the Interstate Commerce Act. Under the tests of that Act, in a case in which a tap line lumber railroad owns the capital stock of a grocery store or a blacksmith shop, even if doubt arose in the Section 1(3) phase of the test, it will become perfectly obvious that transportation rates, conforming with Section 6, of the Commerce Act, cannot be formulated or

published in tariff form for selling groceries or shoeing horses, nor can the grocery store or blacksmith shop yield railroad transportation revenues such as are contemplated in Section 20 of the Interstate Commerce Act. The thought that any industry can be a common carrier under the railroad employment acts and not a common carrier under the same statutory language in the Interstate Commerce Act is untenable.

In *U. S.* v. *American S. & T. Plate Co.*, 301 U. S. 402, 408, this Court held that the Interstate Commerce Commission—

> "is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

That opinion, page 404, points out the importance of the Commission's duties in exercising that power—determination of the character and quantum of services to which prescribed railroad rates apply and suppression of dissipation of revenues emanating from such rates through the granting of allowances to shippers, under Section 15(13) of the Interstate Commerce Act, for the performance of shippers services—such as the private business activities which we have discussed at length herein.

The Commission's decisions, which are well supported by court decisions, should prevail.

Some very important practical questions arise from the Board's proposal to convert this private industry into a railroad transportation agency. Let us assume that some railroad company owned the entire capital stock of a sugar refinery, retail hardware store or a cold storage warehouse company. Can the functions of a modern cold storage warehouse be properly transformd into common carrier transportation duty by any administrative ruling? Is it practicable or feasible for the railroads to assume and perform such functions? In any event, is it the Board or the

Interstate Commerce Commission that should initiate the innovation? This record is devoid of evidence that will even tend to answer any of these except the last question. And when the Board assumes to arbitrarily decide that all kinds of storage is railroad transportation service, contrary to the well grounded opinions of the courts and the Interstate Commerce Commission, it cannot escape error of grave import. Whenever the Board is confronted with a doubtful question as to the character of storage it should submit the matter to the Interstate Commerce Commission for decision. The Commission in Sections 12 and 13 of the Interstate Commerce Act has the required statutory authority.

IN CONCLUSION

We submit that this Court should—

In No. 95. (a) Find that the Board's findings, conclusions and opinion are arbitrary and invalid.

(b) Affirm the opinion of the Circuit Court of Appeals, Second Circuit.

In No. 103. (a) Find that the Board's findings, conclusions and opinion are arbitrary and invalid.

(b) Reverse the opinion of the Court of Appeals of the District of Columbia.

(c) Affirm the judgment of the District Court for the District of Columbia.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 95 and 103.—October Term, 1945.

Railroad Retirement Board, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and George M. Harrison, Petitioners,	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
95 *vs.*	
Duquesne Warehouse Company.	
Duquesne Warehouse Company, Petitioner,	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.
103 *vs.*	
Railroad Retirement Board and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.	

[January 2, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

The Railroad Retirement Act of 1937, 50 Stat. 307, 45 U. S. C. § 228a, established a system of annuity, pension, and death benefits for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for the various types of benefits created by the Act. § 10(b). The eligibility of an employee for such benefits is based on service to those included in the Act's definition of "employer". § 1(a). The question arose whether the Duquesne Warehouse Co. was such an "employer". The Board after a hearing found in No. 95 that it was. Duquesne, pursuant to the provisions of § 11 of the Act, brought suit in a district court to compel the Board to set aside its order.[1] That court rendered judgment for Duquesne. 56 F. Supp. 87. The Circuit Court of Appeals affirmed, by a divided vote. 148 F. 2d 473.

[1] The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and its president, G. M. Harrison, were allowed to intervene as defendants in No. 95. The Brotherhood intervened in No. 103.

The Railroad Unemployment Insurance Act of 1938, 52 Stat. 1094, 45 U. S. C. § 351, established a system of unemployment insurance for employees of designated classes of employers. The Railroad Retirement Board adjudicates claims of eligible employees for unemployment insurance payments. § 5(b). The eligibility of an employee for such payments is based on service to those included in the Act's definition of "employer". § 1(a). The question arose whether Duquesne was such an "employer". The Board after a hearing found in No. 103 that it was. The findings were identical to those which the Board made in No. 95 and were based on the same record. Duquesne, pursuant to § 5(f) brought suit in the district court for the District of Columbia to set aside that order. That court gave judgment for Duquesne. The Court of Appeals for the District of Columbia reversed. 149 F. 2d 507. Since the definition of "employer" under both Acts was the same, there was presented a conflict in decisions which led us to grant the petitions for writs of certiorari.

The material part of the definition of "employer" contained in each Act is as follows:

> "The term 'employer' means any carrier . . . and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service . . . in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad . . . ."

Duquesne meets the requirements of the first part of the definition. For it is a corporation, all of whose stock is owned by the Pennsylvania Railroad Company, a carrier by railroad. The question is whether Duquesne "performs any service" (1) "in connection with the transportation of . . . property by railroad" or (2) "in connection with . . . the receipt, delivery . . . storage, or handling of property transported by railroad."

Duquesne operates two warehouses owned and leased to it by the Pennsylvania, one in Pittsburgh and the other in East Liberty, within the Pittsburgh city limits. Each warehouse is on a rail siding of the Pennsylvania. At East Liberty, Duquesne handles and stores carload sugar, all of which comes in and goes out over the Pennsylvania. The sugar is handled by Duquesne under so-called storage-in-transit privileges covered by tariffs filed

by the Pennsylvania with the Interstate Commerce Commission.[2] Duquesne unloads the sugar from the Pennsylvania's cars on arrival and reloads the sugar into Pennsylvania's cars on their departure. By the tariff the owners are required to do the loading and unloading. The work of unloading and loading is performed for the owner by Duquesne, who bills the owner for that service as well as for storage and other services rendered. At its Pittsburgh warehouse Duquesne handles freight which has come in, or is destined to movement, over the Pennsylvania, or which has both come in and is going out over the Pennsylvania. The commodities handled at that place are hauled in both carload and less-than-carload lots. Duquesne loads and unloads the carload shipments as they arrive at and depart from its platform, stores the goods, and performs other handling services in connection with their receipt and delivery. Duquesne charges the owner for these services. In the case of incoming less-than-carload shipments the freight is unloaded by the Pennsylvania from the cars to its platform and is delivered to and received by Duquesne there. In the case of outgoing less-than-carload shipments, Duquesne delivers the freight on the Pennsylvania's platform. Pennsylvania then issues its bill of lading, loads the freight into cars, and moves them out. During a part of the period relevant here,[3] Duquesne also performed unloading, storing and reloading services and certain other transit services at Erie, Pennsylvania, in connection with carload shipments of newsprint paper which were entitled to storage-in-transit privileges under the tariffs. These services were similar to those performed by Duquesne at East Liberty.[4]

[2] Incoming shipments are consigned to the owner care of Duquesne, the route being designated "Penn R R — For Stge in Transit". Outgoing shipments are consigned to the owner; they have a transit record number and are marked "accorded transit privilege at East Liberty, Pa." That is, sugar in carload lots transported by the Pennsylvania to consignees at East Liberty may be delivered there to the consignees at the local rates. When it is subsequently shipped out via the same road it is entitled to be charged the through rate from the first point of shipment to the ultimate destination.

[3] Between August 1937 and May 1938. The Board found that Duquesne is now, and has been at least since August 28, 1935, an employer within the meaning of the Acts.

[4] Duquesne also has "salvage freight" agreements with the Pennsylvania under which the Pennsylvania turns over to it ~~for resale and disposal~~ over and damaged freight which has been refused or unclaimed by the owner. For this service Duquesne retains 10 per cent of the gross plus certain costs and remits the balance to the Pennsylvania.

, for sale or other disposition, "over

Of the total space used by Duquesne at its warehouses at East Liberty and Pittsburgh about 30 per cent was devoted to the handling of freight accorded storage-in-transit privileges in 1936; about 12.5 per cent in 1937; about 12.5 per cent in 1938. During the period of operation at Erie, all the space at that point was used for such freight.

It appears that the definition of "employer" in the present Acts derives without substantial change from the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. § 151, First.[5] We are referred to the legislative history of the Railway Labor Act which was sponsored by Mr. Eastman, Federal Co-ordinator of Transportation. Reliance is made on his testimony at the hearings[6] as indicating that the words in the carrier definition in the Railway Labor Act descriptive of transportation service were taken from the Interstate Commerce Act[7], 41 Stat. 474, 54 Stat. 899, 49 U. S. C. § 1. The Railroad Retirement Act of 1937 was sponsored by both labor and management, whose views were presented at the hearings by George M. Harrison.[8] References are made to his testimony that the carrier affiliates embraced within the definition of "employer" are those who are engaged in service that is part of railway transportation.[9] Duquesne argues on the basis of that legislative history that any service "in connection with the transportation" of prop-

[5] The corresponding part of the definition of "carrier" contained in § 1 First of the Railway Labor Act reads as follows: "any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . ."

[6] Hearings, S. Committee on Interstate Commerce on S. 3266, 73d Cong., 2nd Sess., pp. 10-11, 145. At the latter point he testified, "I am inclined to believe that for the present it would be well not to go beyond carriers and their subsidiaries engaged in transportation." And see Hearings, H. Committee on Interstate and Foreign Commerce on H. 9650, 73rd Cong., 2d Session., pp. 17, 18.

[7] Sec. 1(3)(a) of the Interstate Commerce Act includes in the definition of transportation "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

[8] See Hearings, H. Committee on Interstate and Foreign Commerce, on H. R. 6958, 75th Cong., 1st Sess., pp. 10-11, 82.

[9] See Hearings, *supra*, note 8, pp. 16, 17. He testified at the latter point that carrier affiliates were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation." And see Hearings, S. Committee on Interstate Commerce on S. 2395, 75th Cong., 1st Sess., p. 11.

erty or any service "in connection with" the receipt, etc., of "property transported by railroad", as used in the present Acts, means that kind of activity which is defined by the Interstate Commerce Act as forming a part of transportation service. On the other hand, the Board argues that the statutory definition of "employer" is not so restricted. It stresses the broad sweep of the statutory language and the purpose to bring under the Act affiliates which carry out portions of the railroad's business.[10]

We do not find it necessary to resolve that controversy. At the very least the phrases in question embrace activities which form a part of transportation service within the meaning of the Interstate Commerce Act. Duquesne regularly performs service of that character. It is, therefore, an "employer" within the meaning of the present Acts.

We have noted the loading and unloading services rendered by Duquesne. The duty of unloading carload freight ordinarily rests with the shipper or consignee. *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U. S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 295 U. S. 193, 200; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an addi-

[10] Senator Wagner, who was in charge of the Retirement Bill in the Senate stated: "the coverage is extended expressly to railroad labor organizations, railroad associations, traffic associations, and is made more clearly applicable to subsidiaries of railroad companies such as refrigerator storage and other facilities. In other words, it covers a greater number of employees, not only those directly in the railroad business but those associated with it, and in that regard it is more liberal than the present act." 81 Cong. Rec. 6223.

In S. Rep. No. 697, 75th Cong., 1st Sess., p. 7, it is stated, after noting that casual service and operation is excluded, "In addition to trucking service, it is intended to exclude employees of a contractor who may, for example, be occasionally employed by a 'carrier' to repair a depot or build a bridge. Contractors, other than those which perform casual service, would not be excluded, irrespective of whether control be legal or de facto. De facto control may be exercised not only by direct ownership of stock, but by means of agreements, licenses, and other devices which insure that the operation of the company is conducted in the interests of the carrier.

"By these changes there are brought within the scope of the act substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States."

It is also pointed out that various railroad associations are included in the Acts and that their express inclusion was to make clear what had been previously implied. *Id.*, pp. 6-7. It is therefore argued that since some of those associations are not engaged in railroad transportation, Congess did not intend the coverage of the Acts to be restricted to organizations engaged in transportation either in the ordinary sense or in the sense in which the Interstate Commerce Act uses the term.

tional charge. *Adams* v. *Mills*, 286 U. S. 397, 410-415; *Loading and Unloading Carload Freight*, 101 I. C. C. 394; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161, 163-164; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330, 336-337. See *Haberman* v. *Pennsylvania R. Co.*, 234 I. C. C. 167, dealing with less-than-carload lots.

Duquesne's answer is that the service of loading and unloading is done by it for its customers, that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services. Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service. It is not whether the affiliate would itself be subject to the Interstate Commerce Act. It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs. If it is such a service, it is a transportation service within the meaning of the present Acts. Senator Wagner, who was in charge of the Retirement Bill in the Senate, stated that its coverage included "not only those directly in the railroad business but those associated with it."[11] And George M. Harrison, on whose testimony Duquesne heavily relies, stated that affiliates of carriers were included "when those companies are engaged in the business of transporting passengers or property for the railroad, or other service that is a part of railway transportation."[12] In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate.

We do not decide whether services other than loading and unloading which are performed by Duquesne are in the same cate-

[11] See note 10, *supra*.

[12] See note 9, *supra*.

gory nor whether the "employer" definitions may be given a broader scope. It is sufficient for the disposition of these cases that the loading and unloading services performed by Duquesne are services performed "in connection with the transportation of . . . property by railroad."

The judgment in No. 95 is reversed. The judgment in No. 193 is affirmed.

It is so ordered.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.